No. 3544

United States

Circuit Court of Appeals

For the Ninth Circuit.

AL WEATHERS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

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AL WEATHERS,

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Brief for Defendant in Error.

STATEMENT OF FACTS IN SHORT.

This is one of a number of cases originally brought against Al Weathers, Ike Weathers and Ernest Stage for a number of larcenies and robberies of certain fish-traps situated on the shores of Southeastern Alaska. On the trial there was a severance demanded and the Government chose to try the case against Ernest Stage first, he having made a confession of substantially all the charges in the various indictments. He was accordingly tried and convicted on the charges in the indictment in the present case. He did not appeal. Later the defendant Al Weathers was put upon trial and was thereafterward found guilty by the

jury and was regularly sentenced to a term of four years' imprisonment.

Thereafter, all the other cases against all the defendants were dismissed upon motion of the district attorney, they being substantially the other cases concerning which proof had been admitted in the case at bar.

It is claimed on behalf of the Government that the case at bar is one of a series of cases in which these three men conspired to rob fish-traps, and for this purpose, to assault the trapmen or trap-tenders by shooting at them, thereby putting them in fear and thus to carry out their scheme of robbery. The specific acts covered by the charges in this indictment were the assaulting and shooting at Captain Knutson and others with the intent of killing or putting them in fear and thereby robbing them of certain fish loaded in a scow and in certain fish-traps, in charge of said Knutson and others, all of which were at the time situated at Admiralty Cove, on the shore of Admiralty Island, within the District of Alaska.

The proof showed that Al Weathers was the owner and master of the boat "Diana." The three jointly operated the boat. On July 8th, 1919, at about 5 o'clock A. M., this boat came into Admiralty Cove and shot many volleys of shots from rifles at the boat "Forester," and those thereon, of which boat Captain Knutson was in charge. A number of bullets struck the boat and scow lying alongside of it, and one bullet passed within four inches of Captain Knutson's head, and another

struck the mast and fell upon the deck, and many others fell in the water near the boat. But at this time some of the trapmen on shore began to fire upon the "Diana," and she turned her course and escaped without getting any fish either from the scow or the traps.

We take it that it would be unnecessary to go into all of the details of the evidence at this time, but suffice it to say that there was left no room for doubt that the defendant, Al Weathers, was one of the parties on the boat on this occasion when this assault was made, and participated therein. This, of course, was the main question presented to the jury, and upon which a verdict of guilty was rendered. We believe that the proof was overwhelming and amply sustains the finding of the jury.

To reverse this finding the appellant has assigned ten alleged errors.

I.

It is assigned as error that the court permitted witness Knutson to testify that on July 10, 1919, he hailed the boat "Diana" for the reason that he recognized it as the boat which had assaulted him two days previous thereto.

This was objected to by defendant, but the Court allowed the evidence. This could in no wise hurt the defendant, as was remarked by the Trial Court. It was simply explaining the action of the witness in hailing the boat, and certainly can be no grounds for assigning error. No objection was made until after the same had been answered.

Hence, objection came too late. Besides, the question was competent.

See Transcript, pp. 22, 23.

The next question asked the witness was: "Did you know what the name of the boat was at this time?" To which the witness answered: "I didn't see the name on her; no."

This question and answer were not objected to at the time.

See Transcript, pp. 24, 25.

And therefore cannot now be objected to or assigned as error. The question was competent.

The next question asked the witness was not objected to and was answered, and therefore cannot now be assigned as error.

Further, neither of said last two questions were open to objection—both were competent and relevant.

The next question was leading, and the Court so ruled and no answer was given to it.

The next question was: "The question was, what was your purpose in hailing the boat and going up close to it. What did you do that for?"

Answer: "I wanted to get up close and see the name of it."

No objection was made to this question and answer at the time, and hence cannot now be made.

See Transcript, pp. 24, 25.

Besides, we insist that the question was competent and proper. No reason was then given, nor is any now given why it was not a proper

question. Several questions and answers follow without objection or exception.

Transcript, p. 25.

Then the question: "Now, when you approached the boat, what did it do?" The witness answered it by saying: "Well, after they run a little while they turned right round."

This was answered without any objection by defendant's counsel until after the answer had been fully given. Then after it was given fully counsel objected. The objection came too late. It should have been made before answer.

Transcript, p. 25.

Besides that, no reason was given why the question was improper. For, indeed, it was not improper or subject to exception.

Thereafter, the witness was further examined as to the actions of the boat "Diana" on that occasion and he detailed certain happenings in regard thereto, told about the boat coming toward his own boat and the men on the "Diana" getting their guns and setting up some square plates against the boat railing, etc., and to none of this evidence was any objection offered.

Transcript, pp. 26, 27, 28, 29.

An objection to evidence must be made at the time it is offered and not after answer. It is then too late. But even after the objections above referred to were made, counsel for defendant proceeded to cross-examine the witness upon all of said matters concerning which said objections had been

made. See Transcript, pages 43 to 48, in which defendant brought out substantially all the same facts to which he had objected. He thereby waived his objections and cannot now complain at their introduction. Besides this, we insist that the evidence was competent and admissible.

II.

As to the second assignment, which was to Dr. Borland's testimony, it will be noted that no objection was made to any question or answer until the question was asked: "I will ask you what you did with reference to that boat [the "Diana"] after seeing it?"

Transcript, p. 74 (near middle).

To this question counsel for defendant objected (see Transcript, pp. 74 and 75); the objection was overruled by the Court. The witness then started to make reply by stating what someone reported to the captain, but upon objection by counsel for defendant did not state what was reported, and was thereupon directed by the district attorney to "Just tell what was done." The witness answered: "They [meaning those on the "Forester"] changed their course and followed the boat."

The above referred to objection made by counsel for defendant was absolutely the only objection offered by defendant to the testimony of Dr. Borland, and his examination proceeded at some length thereafter.

Transcript, pp. 75–78.

After Dr. Borland had finished his examination in chief, he was cross-examined by counsel for defendant at great length and in detail concerning the very facts and circumstances which are objected to and which are now assigned as error. In said cross-examination Dr. Borland reiterated said facts and circumstances.

See Transcript, pp. 79–93.

By so doing we insist that defendant waived any grounds of objection to any such matters, and is now estopped from assigning the same as error.

We further insist, however, that said objections were not well founded, in the first place, and that said testimony was admissible, and that no error was committed in its admission.

III.

The third assignment of error is based upon certain questions asked Ivan Stenso.

Transcript, pp. 104, 105.

After the questions had been answered by the witness, counsel for defendant interposed a general objection, stating no reasons why the same should be allowed. The Court admitted the same, subject to be stricken if at the close of the Government's case no connection had been shown with the defendant, this witness further on having testified in plain terms that it was the boat "Diana"

Transcript, p. 105,

and another witness on the same point, to wit, Andrew Abrahamson, having testified to the same facts as to the boat "Diana," and further as to the

identity of Al Weathers, counsel for the defendant did not further rely upon said objections as shown by his motion filed after the Government had closed its case. See

Transcript, pp. 287, 288.

The same is shown by motion for new trial filed by defendant.

Transcript, pp. 372, 373.

He therefore cannot assign this as error.

IV.

The fourth assignment of error deals with the admission of the evidence of John Hanson as to the robbery of the fish-trap on June 30, 1919.

This was objected to, for the reason, as alleged, it was concerning matters which occurred prior to the matters complained of in the indictment, and in no way connected therewith.

Transcript, pp. 196, 197.

We here call the attention of this court to the ruling of the Trial Court, on the admission of this testimony. How carefully he guarded the rights of defendant. How he explained that this evidence would be competent only in case it should be properly connected up. See Court's rulings as set out in

Transcript, pp. 196, 197, 198, 199, 200, 201.

Note Hanson's identification of the boat "Diana."

Transcript, pp. 205, 206, 207, 208.

While this was not identifying the boat with absolute certainty, yet it did in a way do so, and under the limitations of the Court as expressed

in his rulings, it was allowed to be presented to the jury for what it was worth. Note, too, Hanson's statements as to the identity of the men on the boat with that of the three defendants.

Transcript, p. 203.

But further connection and identification of these occurrences on June 30th is made by Homer Lee, Hanson's co-trap watchman, and by J. H. Ferguson, watchman on adjoining trap.

Transcript, pp. 223, 224, 229, 231, 232, 233.

V.

The fifth assignment of error deals with the admission of the evidence of said John Hanson and Homer Lee, and alleges that the same should have been rejected, "because the witnesses failed in any way to connect the defendant with the commission of any offense," etc.

We submit that said testimony, especially when taken in connection with that of J. H. Ferguson, does fully show the commission of a similar offense by defendant to that charged in the indictment, and for this reason was competent and admissible.

VI and VII.

The sixth and seventh assignments of error deal with the admission of the testimony of Captain Knutson and Dr. Borland as to what occurred on July 10, 1919, near the Sisters Island when they hailed the boat "Diana."

This date, it is true, was two days after the crime charged in the indictment. But the facts proven are not for the purpose of showing any other similar crime or any crime at all, so far as that is con-

cerned. It was simply to show what was done to identify the boat as the boat "Diana," which had committed the assault on July 8th. The boat had been recognized as the same boat, and they wanted to further investigate and learn the name of the boat and who was in charge of the same. This certainly was the natural, legitimate and proper thing to do.

The actions of the defendant on that occasion and his statements were certainly competent and admissible in evidence. The voluntary acts and statements of defendants are always admissible in evidence against them, whether before or after the commission of a criminal act, provided, of course, if they are material and go to explain their actions at the time of the commission of the act charged in the indictment.

VIII.

The eighth assignment of error deals with defendant's motion to strike *all* of the testimony given on behalf of the Government referring to matters occurring on other days than on July 8, 1919.

This motion deals with the testimony of John Hanson, Homer Lee and the testimony of Dr. Borland and Captain Knutson as to what happened on July 10, 1919, and the testimony of Carl Peterson, because, as alleged, "said testimony has no probative force, and does not identify either the defendant or the boat 'Diana'."

The motion also asks that all the testimony on behalf of the Government with reference to commission of offenses other than on July 8th be ex-

cluded, because, as alleged, it is incompetent, for the reasons assigned in the motion.

Transcript, pp. 287, 288.

See ruling of the Court in regard thereto.

Transcript, pp. 288, 289.

We insist that the court made no error in overruling said motion. In the first place, said motion was entirely too broad and general to specify any particular error. In the second place, it was not well taken, because said evidence was all competent and relevant and admissible. The legal reasons for this will be given in later portions of this brief.

IX.

The ninth assignment of error is based upon the Court's refusal to grant a new trial.

Transcript, pp. 272, 273.

This motion is substantially based on the same grounds as the former motion and has no merit.

1. The first ground for said motion was for insufficiency of evidence. Our contention is that the evidence was entirely sufficient to warrant the jury in finding a verdict of guilty. In fact, the jury would have stultified themselves to have found otherwise. It is true that an *alibi* was relied upon, but this was a question for the jury. It will be noted that while the defendant did not take the stand, he did introduce certain witnesses to attempt to prove an *alibi*. But some of these witnesses had been buying the fish which defendant was accused of stealing, and one witness Bennett had in all probability been a partner of defendant, at least

had an agreement to dispose of the fish, and for these reasons evidently the jury were warranted in disbelieving them. The other witnesses on this point, for various reasons, as shown by their cross-examinations, were not believed by the jury.

We understand that this Court will not disturb the findings of a jury on the grounds of insufficiency of evidence unless there be an entire lack of evidence on some material point. In the case at bar there is no such omission or lack of evidence.

2. The second ground for motion for new trial is nothing more than a repetition of the original motion in regard to admission of certain testimony concerning commission of offenses other than those for which the defendant is on trial.

Transcript, p. 372.

It applies to the testimony of Knutson, Alexander, Borland, Hanson, Ferguson, Lee, Witts, Abrahamson, Johnson, Likeness.

Now, at the time of the introduction of the testimony of the witnesses Knutson, Borland and Hanson, defendant did object on the ground stated, *i. e.*, that other offenses could not be proven, but for the reason set out in other portions of this brief, their testimony was admitted. But as to the testimony of Alexander, Ferguson, Lee, Witts, Abrahamson, Johnson and Likeness, no objection was made at the time to the competency of their evidence. This fully appears from an inspection of the record. On the other hand, defendant not only did not object to the introduction of said evidence, but proceeded in each case to cross-examine the witness

upon the very facts complained of, and thus himself established in the record the facts now complained of and the admission of which is assigned as error.

We contend that not having objected at the time said evidence was offered and having cross-examined upon the same, defendant is now estopped to object to the admission of said testimony.

Besides this, the motion is too broad and general.

3. We insist that the third ground for a new trial as set out in motion for new trial, as to the testimony of Hanson, Lee, Ferguson and Borland, and that part of Captain Knutson's testimony in regard to July 10th, is not well taken, for reasons already given in this brief and hereafter to be given.

X.

The tenth assignment of error is not well taken. No reason is shown why the Court should not pronounce sentence and judgment in this case, nor is there any.

The motion is too broad and general. It is not specific.

WHY OTHER ACTS ARE COMPETENT.

In this case it is insisted on behalf of the Government that other similar criminal acts of the defendant are competent in this case, for the following reasons, to wit:

1. To prove intent.
2. To prove motive.
3. To prove knowledge.
4. To prove design.

5. To prove that the crime was committed in accordance with a system, plan or scheme.

Proof of other similar acts is competent to prove intent in cases where the intent with which the act was done is equivocal and such intent becomes an issue at the trial.

Shears vs. State, 46 N. E. 331, 332.

Acts after time charged in indictment may become competent.

Moffatt vs. U. S., 232 Fed. 533.

* * * * * * * * * * *

OVERSTREET vs. STATE, 150 S. W. (Tex.) 899, 901.

(5) It appears that the house of F. L. Taylor was burglarized on the same day by the same parties. In cross-examining appellant the state was permitted to go to some extent into the details of that offense, which was objected to by defendant. As a general proposition of law, details of another crime are not admissible, but, in a case where the appellant contends he entered the house, as in this case, with an innocent intention to get a drink of water, and after getting in there he conceived the idea of theft and stole the property, then the details of contemporaneous offenses committed in the same manner become admissible as bearing on the intent, and in this case there was no error in admitting the testimony. The testimony on intent was sharply drawn in this case; the court, at the request of appellant, giving the following special charge: "You are instructed that, in order to constitute the offense of burglary, the intent

to commit theft must exist at the time the house was entered, and, if you believe from the evidence in this case that the defendant formed the intent to steal for the first time after entering the house of Louis Katz, then you will find the defendant not guilty." Penrice vs. State, 105 S. W. 797. And in Branch's Crim. Law, sec. 338, the rule is correctly stated to be that, when extraneous crimes or other transactions are *res gestae* or tend to show intent, when intent is an issue, they are admissible (citing many authorities).

STATE vs. HARRIS, 133 N. W. (Iowa) 1078. (Supreme Court of Iowa. Jan. 11, 1912.)

1. CRIMINAL LAW (§ 369*)—Evidence—Other Offenses—Identity of Accused.

The burglary of the house which accused was charged with entering in the night-time, armed with a dangerous weapon, was committed in the early part of the 22d day of May; accused being identified as the burglar by two witnesses. A watch taken from the house in question was afterwards found with property taken from the home of S., burglarized on the night of May 19th, and with other property taken from the home of D., burglarized on the night of May 23d, and the evidence tended to show that all the property had been in accused's possession, and was under his control when arrested. Held, that the state could show by the S. family that accused was the person who entered their home armed with a dangerous weapon, and took the property, for the purpose of identifying accused as the person who committed the offense charged, though such evidence

incidentally tended to prove his guilt of an independent burglary.

HUFF et al. vs. UNITED STATES, 228 Fed. 892.

1. CRIMINAL LAW—Evidence—Other Offenses.

On a trial for conspiring to forcibly arrest W. for the purpose and with the intent to hold him in a condition of peonage, the Government offered evidence tending strongly to prove concerted action by defendants in arresting, whipping and returning W. to an employer, whose employment he had deserted. Defendants offered evidence attacking the character and reputation of the prosecuting witness, evidence tending to prove an *alibi* for some of the defendants, and evidence of the good character and standing of all of the defendants. Held that, in rebuttal, evidence that, about the time laid for the conspiracy, the defendants were acting in confederacy and concert in arresting without warrant, whipping and forcibly returning other laborers to the custody and service of employers whom they had deserted, was admissible for the purpose of showing the accord and combination of the alleged conspirators and their intent in committing the acts charged, and it was immaterial that this also tended to prove other offenses and had a bearing on the question of defendants' good character.

PEOPLE vs. JENNINGS, 43 L. R. A. (N. S.) 1210.

The plaintiff in error insists that reversible error was committed in receiving the testimony of Halsted, Mrs. McNabb, and Jessie McNabb.

The general rule is, that evidence of a distinct substantive offense cannot be admitted in support of an-

other offense. Farris vs. People, 129 Ill. 521, 4 L. R. A. 582, 16 Am. St. Rep. 283, 21 N. E. 821; Addison vs. People, 193 Ill. 405, 62 N. E. 235; People vs. Cleminson, 250 Ill. 135, 95 N. E. 157. But to this rule there are several well-known exceptions. If evidence is admissible on other general grounds, it is no objection to its admission that it discloses other offenses, even though they are the subject of indictment. 1 Roscoe, Crim. Ev., 8th ed., 138; People vs. Hagenow, 236 Ill. 514, 86 N. E. 370; People vs. Molineux, 168 N. Y. 264, 62 L. R. A. 193, 61 N. E. 286. "Whatever testimony tends directly to show the defendant guilty of the crime charged is competent, although it also tends to show him guilty of another and distinct offense . . . A party cannot, by multiplying his crimes, diminish the volume of competent testimony against him." State vs. Adams, 20 Kan. 311. The test of admissibility is the connection of the facts proved with the offense charged. Billings vs. State, 52 Ark. 303, 12 S. W. 574; People vs. Walters, 98 Cal. 138, 32 Pac. 864; State vs. Sebastian, 81 Conn. 1, 69 Atl. 1054; 1 Wigmore, Ev., sec. 216. Evidence which has "a natural tendency to establish the fact in controversy" should be admitted. Com. vs. Merriam, 14 Pick. 518, 25 Am. Dec. 420; Lamphere vs. State, 114 Wis. 193, 89 N. W. 128. One of the well-known exceptions to the settled rule as to the admission of evidence as to collateral crimes is when evidence of an extraneous crime tends to identify the accused as the perpetrator of the crime charged. 6 Enc. Ev. 677; People vs. Molineux, 168 N. Y. 268, 62 L. R. A. 193, 61 N. E. 286. When an *alibi* is disputed it is admissible to prove a collateral

offense to prove that at the time the accused was in the vicinity. Wharton, Crim. Ev., 8th ed., sec. 47, note 1; 21 Cyc. 900, 901; State vs. Johnson, 111 La. 935, 36 So. 30, and cases cited; Richardson vs. State, 145 Ala. 46, 41 So. 82, 8 Ann. Cas. 108; State vs. Bates, 182 Mo. 70, 81 S. W. 408; Johnson vs. Com., 115 Pa. 360, 9 Atl. 78.

In view of plaintiff in error's statements, after his arrest and before the trial, as to his whereabouts on that night, it was competent for the state to prove that shortly before the crime was committed he was near the scene of the crime, even though when seen by some of the witnesses he was engaged in the commission of other crimes. The evidence objected to tended strongly to contradict his statements as to his whereabouts at that time.

It is further insisted in this connection by plaintiff in error that the evidence of Halsted, Mrs. McNabb and Miss McNabb was inadmissible because of the uncertain character of the identification. A great deal has been written and said in the past concerning the doubtful nature of testimony identifying persons. Men's faces, like their handwriting, may be so similar that the keenest observer may be baffled in seeking to discover differences. "The witness," says Wharton, "is asked how he knows that the prisoner at the bar is the person who fired the fatal shot, and his answer is, 'I infer it from a similarity of eyes, of hair, of height, of manner, of expression, of dress.' Human identity, therefore, is an inference drawn from a series of facts, some of them veiled, it may be, by disguise and all of them more or less

varied by circumstances." Wharton, Crim. Ev., 8th ed., sec. 13. In his charge to the jury in the Tichborne Case, Lord Cockburn said: "Frequently a man is sworn to who has been seen only for a moment. A man stops you on the road, puts a pistol to your head, and robs you of your watch or purse; a man seizes you by the throat, and while you are half strangled his confederate rifles your pockets; a burglar invades your house by night, and you have only a rapid glance to enable you to know his features. In all these cases the opportunity of observing is so brief that mistake is possible, and yet the lives and safety of people would not be secure unless we acted on the recollection of features so acquired and so retained, and it is done every day." (See citations.) In Ogfen vs. People, 134 Ill. 599, 25 N. E. 755, the accused was charged with robbery. On the trial one Martin and his wife and daughter, who had known the accused for ten years, testified that he came to their house at night with his face wrapped in red flannel and ordered them to deliver up their money. They testified positively to his identification, recognizing his voice. The Court held the testimony competent, and affirmed the judgment. It has been frequently held that a witness may testify to a person's identity from his voice or from observing his stature, complexion, or other marks. (See citations.) This testimony was competent. The weight to be given it was a question for the jury, in view of all the other circumstances and evidence in the case.

KINSER vs. UNITED STATES, 231 Fed. Rep. 856, 860.

The admissibility of evidence of other transactions showing intent has been fully considered by this Court. (See citations.) In view of these authorities it seems entirely a work of supererogation to cite those from elsewhere. Nor do we find anything in People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 61 L. R. A. 193, in conflict with our previous rulings. In that case it was said:

"Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish; * * * (2) intent; * * * (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others."

COLT vs. UNITED STATES, 190 Fed. Rep. 307.

In Thomas vs. United States (156 Fed. 897, 911), above, this Court, speaking by Judge Adams, said upon this question:

"Nothing is better settled in the law of evidence in any case involving fraudulent intent than that other acts and dealings of the accused of a kindred character to those charged in the case in hand and performed at or about the same time are admissible to illustrate and establish the intent or motive in the particular act directly in judgment."

MOFFATT vs. U. S., 232 Fed. Rep. 533.

(4) A witness was allowed to testify over objections as to what was done in regard to oil wells on the property after the last date at which the mails were

charged to have been fraudulently used, and whether the wells produced oil, and how long they continued productive. The objection of counsel for the accused was as follows:

"I object. The history of what was done there must end on the 10th of October (1911). That is the last day that Moffatt is charged with having knowledge of the conditions, and we cannot impute any fraudulent intent to Moffatt for something that occurred afterward."

After the testimony was received counsel said;

"To make my record perfectly clear, I move at this point to strike out all that this witness has said in reference to conditions or operations after the 10th of October, 1911."

The Court held as follows: "It is quite true that an act which is not an offense when committed cannot be made one by the subsequent independent act of the person with whom it has no connection (U. S. vs. Fox, 95 U. S. 670, 24 L. Ed. 538); also that the criminal character of a transaction is to be determined by the conditions existing at the time (Norton vs. U. S., 205 Fed. 593, 123 C. C. A. 609); also that the intent with which an accused does a subsequent act cannot be imputed to him as of the prior date of the crime charged (U. S. vs. Wootten (D. C.) 29 Fed. 702.) These rules, however, do not conflict with or impair the long-established doctrine that in cases involving fraud, or the intent with which an accused does an act, collateral facts and circumstances, and his other acts of a kindred character, both prior and subsequent, not too remote in time, are admissible in evidence. (See citations.) There-

fore, so far as the effort of counsel was to exclude the subsequent acts of the accused of the character mentioned, it was properly denied."

WOOD vs. U. S., 41 U. S. 358.

Passing from this, the next point presented for consideration is, whether there was an error in the admission of the evidence of *fraud, deducible from the other invoices offered in the case. (*360) We are of opinion, that there was none. The question was one of fraudulent intent or not; and upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. Indeed, in no other way would it be practicable, in many cases, to establish such intent or motive, for the single act, taken by itself, may not be decisive either way; but when taken in connection with others of the like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty. The treatises on evidence by Mr. Phillips and Mr. Starkie contain many illustrations to this effect. (See citations.)

They constitute exceptions to the general rule, excluding evidence not directly comprehended within the issue; or rather, perhaps, it may with more certainty be said, the exception is necessarily embodied in the very points in issue, is necessarily embraced in it, and therefore a proper subject of proof, whether it be direct or only presumptive. This doctrine was

held in a most solemn manner in the case of the King vs. Wylie, 4 Bos. & P. 92, where upon an indictment for disposing and putting away a forged bank note, knowing it to be forged, evidence was admitted of other forged notes having been uttered by the prisoner, in order to prove his knowledge of the forgery. The same doctrine has been held in cases of the uttering of bad money and spurious notes; and also in cases of conspiracy. The same doctrine was affirmed and acted upon by this Court, in the case of the U. S. vs. Wood, 14 Pet. 430, in the case of a prosecution for perjury.

Where intent, motive, knowledge or design is one of the elements of the crime charged, or if it is claimed that the crime was committed in accordance with a system, plan or scheme, evidence of other like conduct at or near the time charged is admissible; the question as to whether the other occurrence sought to be proved is at or near the time of the transaction charged being a matter almost wholly within the discretion of the Court.

STATE vs. CORCORAN, 143 Pac. 454.

(1) It is argued by the appellant that it was error for the Court to permit evidence relating to the padding of the invoice, or to the taking of the chamois skins on May 9, 1913, or of finding the secreted articles in and about the work-bench of the appellant. It is contended that this was error because it permitted the state to prove an independent crime, and thereby prejudice the jury against

the appellant. There can be no doubt that, as a general rule, evidence of other distinct criminal acts cannot be introduced to prove a defendant guilty of an independent crime charged against him. This court has frequently so held. But there are exceptions to this rule. The exceptions are well stated in the case of Collier vs. State (Miss.), 64 South. 373, where it was said:

"Upon the trial of an indictment, a previous crime committed by the defendant can be proved only: (a) Where it is connected with the one charged in the indictment, and sheds light upon the motive of the defendant; or (b) where it forms part of a chain of facts so intimately connected that the whole must be heard in order to interpret its several parts; or (c) in cases of conspiracy, uttering forged instruments of counterfeit coin, and receiving stolen goods, for the sole purpose of showing a criminal intention."

This Court has held to the same effect. In State vs. Pittam, 32 Wash. 137, 72 Pac. 1042, it was said:

"It is a well-established rule that it is not competent to show the commission by the defendant of other distinct crimes for the purpose of proving that he is guilty of the criminal charge; but, for the purpose of construing the actions or of ascertaining the intent of the defendant in the commission of the acts proven, other independent culpable acts are sometimes admissible in evidence. * * * We think it was competent to show that in the general scheme he adopted in keeping his accounts with his employer, the result was the appropriation

by him of the funds of the employer, not for the purpose of prejudicing a jury against him by proving the commission of independent crimes, but to throw light on his intentions in the perpetration of the particular transaction constituting the crime charged."

And in State vs. Dana, 59 Wash. 30, 109 Pac. 191, we said:

"Of course, if the offered testimony was relevant to the issues in this case, the fact that it tended to show the commission of another and different crime would not exclude it."

And in State vs. Leroy, 61 Wash. 405, 112 Pac. 635, we said:

"Testimony otherwise relevant does not become incompetent because it may tend incidentally to show that the accused has committed another crime."

It is true the statute provides at section 2580, Rem. & Bal. Code, that every person who shall unlawfully break and enter any building where property is kept for use, sale or deposit shall be deemed to have broken and entered with intent to commit a crime therein, but this does not prevent the state from showing the intent of the person breaking and entering. The effect of the evidence which was introduced was to show a course of conduct on the part of the appellant. The padding of the inventory, the concealment of goods which were afterwards taken away, the fact that the appellant entered the store when no one else was present, and out of hours, and took articles from the store, tended to

show the intent of the appellant upon entering the store at unusual hours, and upon the occasion charged. We are clearly of the opinion that for the purpose of showing intent, the course of conduct of the appellant was properly in evidence in this case; and falls within the exception to the rule rather than within the rule.

DEFENDANT'S NEW ASSIGNMENT OF ERROR.

Counsel for defendant now comes into this court and in his brief, pages 21 and 22, for the first time attempts to make a new and additional assignment of error, charging the failure on the part of the Government to prove venue and further to prove that the Hoonah Packing Company is a corporation.

This point was not made in either the assignment of errors or in the motion for a new trial, or otherwise. It is therefore too late to make it here.

Points of error must be particularly pointed out in assignments of error.

> Walton vs. Wild Goose, 123 Fed. 209, 60 C. C. A. 155, 2 Alaska Rep. 644.

Objections not raised in the trial court cannot be raised for the first time on appeal.

> Ames vs. Farrelly, 121 Fed. 820;
>
> Ins. Co. vs. Conoley, 63 Fed. 180, 58 C. C. A. 258;
>
> Third Nat. Bank Phil. vs. Nat. Bk. of Chester, 86 Fed 852, 2 Alaska, 645.

Technical objections must be specified in assignment of error.

State vs. Lea, 122 Fed. 614; South. Rept. 51, 52.

The practice and procedure in Alaska cases is the same as in the United States courts.

Compiled Law Alaska, § 1340.

But the point attempted to be made is not well taken. The record shows by many witnesses that the crime was committed at Admiralty Cove, on Admiralty Island. This locates the place definitely upon the chart of Alaska. Besides this, the court would take judicial knowledge of the location of the island, and Admiralty Cove. Admiralty Island is a very large island in Southeastern Alaska. Courts take judicial notice of the established boundaries of the state or territory where they are sitting and will know that a certain tract or region is or is not included therein.

16 Cyc., p. 859, § 13b, and authorities there cited.

We insist that there is no error in the record affecting the substantial rights of the defendant, and that therefore the judgment of the trial court should be affirmed.

Respectfully submitted,
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U. S. Dist. Atty.,
For Defendant in Error.